No. 15221

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN FARLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ANSWER AND REPLY BRIEF
of
Appellant-Appellee John Farley

Appeal from the United States District Court
for the District of Oregon.

Honorable William G. East, Judge.

WILLIAMS & ALLEY,
DAVID R. WILLIAMS,
1212 Failing Building,
Portland 4, Oregon,
For Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 5-57

SUBJECT INDEX

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (Cont.)

TABLE OF AUTHORITIES (Cont.)

TABLE OF AUTHORITIES (Cont.)

No. 15221

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN FARLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ANSWER AND REPLY BRIEF
of
Appellant-Appellee John Farley

Appeal from the United States District Court
for the District of Oregon.

Honorable William G. East, Judge.

INTRODUCTORY

This brief combines the answer of John Farley to the brief for appellee-appellant, United States of America, and the reply brief of John Farley upon his appeal. Because of the confusion in nomenclature engendered by the cross appeal, we shall refer to the parties as libellant and respondent. In its opening brief, respondent, United States of America, has argued its appeal

upon an issue which it terms jurisdictional, and upon the merits of the case. We shall answer these contentions under the heading "Jurisdiction" and "Merits of the Case."

We shall thereafter reply to the Answer of the Respondent upon the issue of damages, which is the sole basis of the appeal of libellant Farley.

STATEMENT OF FACTS ON JURISDICTION

Libellant, while employed aboard the S. S. AUGUSTIN DALY, a vessel owned and operated by the United States, was seriously injured in the port of Sasebo, Japan, on April 6, 1952. On March 25, 1954, approximately twelve days before the two-year statute of limitations provided by the Suits in Admiralty Act would have run, Farley mailed a formal notice of claim to the General Agent of the vessel and also to the U. S. Maritime Administration (Tr. 16; Lib. Ex. 4, Tr. 455).

On April 2, 1954, approximately four days short of the expiration of two years following his injury, Farley filed his libel herein. On the day following the filing of the libel, counsel for Farley notified counsel for the respondent by letter that an extension of time for sixty days from and after March 25, 1954, was given the respondent within which to answer or otherwise appear (Tr. 458; Lib. Ex. 8).

No request was made to the Court by respondent for a stay in the proceedings or for additional time within which to answer or appear. On the contrary, re-

spondent, United States, filed its Exceptions to the libel on April 22, 1954 (Tr. 8), approximately two weeks after the statute of limitations would appear to preclude refiling.

Respondent's exceptions to the libel were presented to U. S. District Judge Claude McColloch for consideration upon argument and memorandum briefs. Judge McColloch overruled the exceptions (Tr. 11). The case did not come on for trial until July 27, 1955, approximately one year and three months later (Tr. 38).

After the overruling of its exceptions to the libel, respondent, United States, continued to assert the same defense in its Answer and in the pretrial order. The issue was again resolved adversely to respondent by the trial judge, Hon. William G. East, in his conclusions of law dated March 23, 1956 (Tr. 41).

Stated briefly, the objections raised by the respondent involved the following issues:

(1) Whether there was any requirement of filing notice of claim and administrative disallowance thereof applicable to this libel.

(2) Whether, if such requirement existed, administrative disallowance of claim is a condition precedent to filing the libel, or is merely a bar to jurisdictional enforcement thereof.

(3) Whether, assuming notice of claim and administrative disallowance thereof was a condition precedent to filing the libel, prematurity of filing was cured before final determination of the cause.

SUMMARY OF ARGUMENT ON JURISDICTION

(1) There was no legal requirement for notice of claim and administrative disallowance when the libel was filed.

(2) If notice of claim and administrative disallowance were required, such was not a condition precedent to filing the libel.

(3) If the libel was prematurely filed, the cause of action matured before final determination of the case on the merits.

ARGUMENT

(1) No Requirement for Notice of Claim and Administrative Disallowance Existed When Libel Was Filed

By the Suits in Admiralty Act (Title 46 USCA, Secs. 742-745, 1920) the United States consented to be sued by libel in personam in maritime tort cases involving government ownership or operation of merchant vessels. *Johnson v. United States Shipping Board Emergency Fleet Corp.,* 280 U.S. 320, 50 Sup. Ct. 118, 74 L. Ed. 451 (1929); *Desrochers v. U. S.,* 105 F.2d 919 (2 Cir. 1939). Under this act recovery may be predicated on unseaworthiness or negligence. The standards of care required of marine employers by the Jones Act (which incorporates the Federal Employers Liability Act) are applicable to the Suits in Admiralty Act. Prior to the Clarification Act of March 24, 1943 (50 USCA App. 1291, 57 Stat. 45), a seaman injured aboard a govern-

ment-owned or operated merchant vessel was not required to pursue any administrative remedies before filing his libel.

Upon the requisition of the merchant fleet in time of war, thousands of seamen became employed by the United States through the War Shipping Administration. The Clarification Act, inter alia, prescribed the conditions of employment for this wartime influx of maritime government employees. In the legislation as enacted, seamen were specifically denied the benefits of the U. S. Employees Compensation Act, the Civil Service Retirement Act, and other remedial federal legislation, for the following reason set forth in the act:

> "Such seamen, because of the temporary wartime character of their employment by the War Shipping Administration, shall not be considered as officers or employees of the United States for the purposes of . . ." (The federal employees acts previously set forth).

As to seamen's claims for injuries, maintenance and cure, wages, etc., the Clarification Act provides that such claims, if administratively disallowed, shall be enforced pursuant to the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of said Act. The Clarification Act also provides that administrative disallowance shall be in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration.

As is stated in the case of *Manderscheid v. U. S.*, 88 F.Supp. 232 (N.D. Cal. S.D. 1950):

> "The Clarification Act extended the right to sue (note: then existing under the Suits in Admiralty Act) to seamen aboard government ships employed as public vessels. But to prevent the flood of war-time litigation which the hazards of war-time operations made imminent, an administrative disallowance of claims of seamen employed on both classes of vessels was made a prerequisite to enforcement under the Suits in Admiralty Act."

It is thus seen that the Clarification Act is not a statute waiving sovereign immunity from suit except as to those cases where the seaman was not employed aboard a merchant vessel. As to merchant vessels owned or operated by the United States, the government had given its consent to be sued some 23 years earlier, and thus the Clarification Act cannot be correctly described as a statute waiving sovereign immunity. On the contrary, as to government-operated merchant vessels (which is the type involved in the instant case) the Clarification Act is a legislative attempt to attach certain conditions in limitation of a cause of action already in existence. As such, the legislation should be construed strictly against the sovereign and in favor of the class of persons intended to be benefited by the earlier remedial legislation.

Pursuant to the Clarification Act, the Administrator, War Shipping Administration, promulgated certain rules and regulations requiring notice of claim to be given, and administrative disallowance thereof, prior to enforcement of claims by court action (General Order 32, April 22, 1943, 8 Fed. Reg. 5414). These regulations required a notice of claim to be filed with the General Agent for the vessel involved, and the claim was pre-

sumed to be administratively disallowed 60 days thereafter, if neither allowed or disallowed in the interim.

The War Shipping Administration ceased to exist on September 1, 1946, and on the same date its successor agency, The Maritime Commission, ordered all of the orders and regulations of its predecessor agency continued in effect (46 CFR 687. Head note to Subchapter G).

As is stated in the case of *Burton v. United States,* 109 F.Supp. 139, 142 S.D. N.Y. 1952):

> "When the Maritime Commission took over the functions, powers and duties of the no longer existing Administration on September 1, 1946, it did so to liquidate the Administration's affairs by December 31, 1946. It merely stood in the Administration's shoes. The Commission so treated its functions in this regard as temporary, as to deliberately neglect to amend the Administration's regulations by substituting its own name therein. If the requirement for the administrative disallowance of a claim under the Clarification Act and the Administration's Regulations at all survived the demise of the Administration on August 31, 1946, it, at most, prevailed only until two years thereafter. . . .
>
> "It is also significant that in the first regulations adopted by the Federal Maritime Board, as successor to the Maritime Commission under Reorganization Plan No. 21 of 1950, 'Subchapter G—Emergency Operations' was omitted. This omission may be regarded as administrative recognition of the obsolescence of its provisions, including those upon which respondent here relies."

The Clarification Act applied only for the duration of the war and six months thereafter. (Benedict on Admiralty, 6th Ed., Vol. 1, Pocket Supplement, p. 152.)

On June 2, 1951, Public Law 45, Chapter 121, 82nd Congress, 2d Sec. 65 Stat. 59 was passed, entitled "Third Supplemental Appropriations Act, 1951." The body of this statute commences as follows:

> "The following sums are appropriated, out of any money in the Treasury not otherwise appropriated, to supply supplemental appropriations for the fiscal year ending June 30, 1951, and for other purposes, namely:"

Thereafter follow approximately sixty separate appropriations to various governmental agencies, including the House of Representatives Stationery Revolving Fund, and the Department of Commerce Vessel Operations Revolving Fund. The entire statute is concerned with appropriations and fiscal policy associated therewith.

The quoted excerpt from the statute which appears on page 6 of the United States' brief is misleading when removed from context. Placed back in context, it is clearly seen that the language is designed solely to prevent such seamen, employed through general agents on government owned or operated vessels (and thus technically United States government employees) from achieving full status as government employees for purposes of the U. S. Employees Compensation Act, the Civil Service Retirement Act, and other kindred government employee benefits.

Further reasons clearly indicate that the 3rd Supplemental Appropriations Act, 1951, neither re-enacted nor revived the then defunct Clarification Act. The Clarification Act was set forth in that portion of Title 50,

USCA Appendix entitled "Emergency and War Shipping Acts." The body of the Clarification Act makes repeated references to war activities and the War Shipping Administration. The notice of claim provisions relate exclusively to rules and regulations prescribed by the War Shipping Administration. If Congress intended to revive the notice of claim provisions of the Clarification Act, it would certainly not have done so by naming a governmental agency then five years deceased to administer its provisions. The answer is inescapable that Congress, in 1951, incorporated certain portions of the Clarification Act merely as an implementation to its fiscal policy expressed in an appropriation measure. That the 1951 Supplemental Appropriations Act was not an express or implied revivor of the Clarificaton Act is thus shown by statutory history and careful analysis.

Various cases have been decided since 1951 which discussed the notice of claim provisions of the Clarification Act. Only one of these cases, *Thomas v. U. S.*, 127 F.Supp. 48, even briefly mentions the 1951 act relied on by respondent.

Respondent makes the astounding contention that the 1957 Supplemental Appropriations Act not only revives the Clarification Act, but also incorporates by reference the administrative rules and regulations of the long defunct War Shipping Administration, relating to notice of claim and administrative disallowance. This contention is wholly unsupported by authorities. The cases cited by respondent on page 18 of its brief involve only a familiar principle of statutory construction which

is expressed in 42 Am. Jur. of Public Administrative Law, Sec. 83, p. 409, as follows:

> "Nevertheless, the rule that re-enactment of the language of the statute is an adoption of a previous administrative construction is nothing more than an aid in statutory construction, and while useful at times in resolving ambiguities, does not mean that the prior construction has become so imbedded in the law that only the legislature can effect a change."

If any lingering doubts persisted respecting the existence of General Order 32 (WSA Regulations re notice of claim and administrative disallowance), such were dispelled by the specific revocation thereof by the Maritime Commission on December 21, 1953. 18 Fed. Reg. 8730. This action destroyed with certainty and finality the entire basis for respondent's objections to jurisdiction herein. At the date of filing this libel, April 2, 1954, there were no rules or regulations of any kind or character requiring notice of claim to be filed and administrative disallowance thereof. There was no governmental agency with which such a notice could be filed, or which could receive, process, allow or disallow such a claim.

The power of an administrative agency to establish rules and regulations necessarily implies the power to modify, repeal or create anew. *U. S. v. Eliason,* 16 Pet. (U.S.) 291, 10 L. Ed. 968.

The decision of the Maritime Commission to abolish the regulations was undoubtedly prompted by a recognition of the statutory, administrative and practical obsolescence of General Order 32, and a desire to clarify

the law and avoid results of conflicting court decisions. The cases of *Danstrup v. The Richard P. Hobson,* 112 F. Supp. 851, and *Burton v. U. S.,* 109 F. Supp. 139, were decided within the year immediately preceding the specific revocation of General Order 32. The cases reached opposite conclusions relative to the continued existence of General Order 32. In the wake of these decisions, the abolition of General Order 32 was thus deliberate, intentional and final.

On April 7, 1955, the National Shipping Authority promulgated new regulations which include similar provisions to those contained in former General Order 32.

During the period December 24, 1953 to April 7, 1955, it is clear that no rules, regulations or procedure existed for filing of notice of claim or obtaining its disallowance.

Only one case is found which discusses the December, 1953 revocation of General Order 32; *Kinman v. U. S.,* 139 F. Supp. 925, cited in respondent's brief. This case concerns an extension of the two year Suits in Admiralty statute of limitations by 60 days. The Court observed that the notice of claim was filed and disallowed prior to revocation of General Order 32 on December 24, 1953. It follows that after December 24, 1953, and prior to April 7, 1955, notice of claim and administrative disallowance thereof were unnecessary prior to filing a libel.

The case of *Handley v. U. S.,* 127 F. Supp. 539 (S.D. N.Y., 1954) is one wherein the Court carefully considered the conflicting judicial viewpoints set forth in the

cases of *Burton v. U. S.*, supra, and *Danstrup v. The Richard P. Hobson,* supra. The Court followed the rule of the Burton case, and in rejecting the reasoning of the *Danstrup v. The Richard P. Hobson* case, stated:

> "However pertinent the analysis is to the injury in 1944, it is, I feel, not pertinent to the injury in 1952. For injuries of such a date the administrative history does not disclose a 'uniform attempt to conform to the expressed purpose of the Clarification Act' in providing for the requirement of administrative disallowance of claims prior to resort to the Courts."

The cases cited by respondent involving libels filed prior to December 24, 1953, have no relevance whatever to the instant controversy. None of the later decisions cited by respondent refer to the 1953 revocation of General Order 32 except the case of *Kinman v. U. S.*, supra.

(2) Notice of Claim and Administrative Disallowance, If Required, Are Not Conditions Precedent to Filing a Libel.

As a precautionary measure, a proper notice of claim was filed herein on March 25, 1954. The libel was filed approximately eight days thereafter, and the trial of the case commenced over fifteen months later. Although we cannot conceive of any administrative disallowance of claim requirement after December 24, 1953, the case of *Manderscheid v. U. S.*, 88 F. Supp. 232 (N.D. Cal. S.D., 1950) holds that such requirement is not a condition precedent to filing the libel, but is only a temporary bar to its enforcement. The case involves the identical factual situation herein; i.e., the filing of notice of claim

and the filing of the libel thereafter, prior to actual or presumptive disallowance of the claim, in order to prevent the statute of limitations from running.

The following quotations are taken from this case:

"The United States contends that this Court has no jurisdiction to entertain the libel because it was commenced before the claim had been administratively disallowed either affirmatively or presumptively by the General Agent's failure to act within 60 days after receiving the claim."

"Neither logical reasoning nor Congressional intent support the assumption that administrative disallowance of seamen's claims must preceed the *filing* of suit. There is not the slightest indication of any Congressional concern as to a sequential relationship between administrative decision and commencement of suit. What is indicated is that Congress wanted an adequate opportunity for administrative action before there could be judicial *enforcement of* the tendered claim."

"The basic purpose of the Clarification Act was to preserve the existing rights of seamen. As important as any of these rights was a two-year period in which to commence suits, under the Suits in Admiralty Act. Congress manifested no intention that this period should be shortened. Yet, the effect of the regulations requiring that, in the event of inaction on the part of the General Agent, 60 days must elapse after the claim is filed before suit can be commenced, is to reduce the two-year period by two months. Legislation intended to be a boon to seamen could thus be converted into a trap for the unwary."

"But the mere filing of suit to prevent the action from being barred by the two-year limitation provision of the Suits in Admiralty Act need not have the effect of depriving the administrative agency of the full time specified within which to make its

determination. If need be, the Court can stay the proceeding until the agency has had a full 60 days to study the claim. If, in the meantime, the claim is allowed, the suit can be dismissed; if the claim is disallowed, and no action is taken within the prescribed period, the suit can proceed."

"It is my opinion Congressional intent will best be effectuated by permitting this suit to proceed. Particularly is this so, if we give heed to the admonition that legislation for the protection of seamen must be liberally construed in their favor. McInnis v. United States, 9 Cir. 153 F.2d 387, and cases there cited."

The compelling logic of this decision should be determinative herein if any disallowance of claim provisions were operative after December 24, 1953.

(3) If Libel Was Prematurely Filed the Cause of Action Matured Before Final Determination of the Case.

Even assuming that administrative disallowance of claim was a condition precedent to the filing of the libel, it should not be dismissed for prematurity.

Where threat of permanent foreclosure of judicial review of administrative determination by Suits in Admirality statute of limitations is imminent, the injured party should be permitted at least to file, if not to prosecute his libel in Court. *Atlantic Carriers, Inc., v. United States,* 121 F. Supp. 5.

It is not the practice in Admiralty to dismiss a libel because prematurely filed, if the right has accrued afterward, and before the matter is presented for final de-

termination. *Munson SS Line v. Glasgow Nav. Co.*, 235 F. 64; *The Pioneer*, 53 F. 279; *Moran Towing and Transportation Co. v. U. S.*, 56 F. Supp. 106; *Skibs, et al v. Cursetjee and Sons, Ltd.*, 133 F. Supp. 467 (N.Y. D.C. 1955).

The rule of strict construction of the language of statutes waiving sovereign immunity is not applicable to the Suits in Admiralty Act, the liberal provisions of which should not be interpreted in a restricted sense. *Nahmeh v. U. S.*, 267 U.S. 122, 125, 45 S. Ct. 277, 69 L. Ed. 536.

In discussing the Clarification Act, this Court stated in the case of *McInnis v. U. S.*, 152 F.2d 387 (9 Cir. 1945):

> "Such legislation concerning seamen's injuries and maintenance and cure has always been construed with extreme liberality in their favor. Jamison v. Encarnacion, 281 U.S. 635, 640, 50 S. Ct. 440, 74, L. Ed. 1082; Aguilar v. Standard Oil Co., 318 U.S. 724, 729, 63 S. Ct. 930, 87 L. Ed. 1107; Cortes v. Baltimore Insular Line, 287 U.S. 367, 375, 53 S. Ct. 173, 77 L. Ed. 368.

It follows that the lower court's rulings on respondent's objections to jurisdiction should be sustained.

STATEMENT OF FACTS ON THE MERITS

The purported statement of facts appearing on pages 20 to 24 of respondent's brief represents nothing more than a slanted and argumentative presentation of matters deemed favorable to the vessel owner.

The "SS AUGUSTIN DALY" anchored in the harbor of Sasebo, Japan, on the morning of April 2, 1952, and remained there until the day of Farley's injury, April 6, 1952. Although the crew was given shore liberty during the five days of the vessel's stay in Sasebo, the only device provided for ingress and egress from the vessel was a pilot ladder. The ship was equipped with an accommodation ladder which was not rigged for use at Sasebo.

An accommodation ladder is a rigid series of steps made in one or two sections, and is provided with handrails. The upper end of the accommodation ladder is bolted to a platform which folds out from the main deck of the vessel in a horizontal position. The ladder extends down diagonally and parallel to the side of the vessel, and the lower end is supported by a chain which is fastened to a block and pawl from one of the ship's davit's (Tr. 58, 513).

A pilot ladder is a flexible rope ladder with wooden crosspieces for steps, which is fastened on the deck and hangs down over the side of the vessel to the water line. The bottom of the ladder is not secured (Tr. 511).

Prior to the time of libellant's injury, all discharge of cargo had been completed, and the vessel was no

longer tender (Tr. 588). The draft of the vessel was not such as to render the use of the accommodation ladder impractical (Tr. 94-97, 607). Three witnesses testified that the accommodation ladder is the customary device employed for a vessel at anchor when shore liberty for the crew is granted, and a pilot ladder is not a safe device for that purpose (Tr. 65, 141, 391).

The pilot ladder was affixed to the pipe rail on the boat deck of the vessel (Tr. 511, 566). It was known that the majority of the crew in ascending the ladder would get off at the main deck level where their quarters are located (Tr. 524, 593). It is considerably more difficult to get off the pilot ladder at the main deck level when the ladder does not terminate there, but continues up to the boat deck level (Tr. 156, 157, 177, 593).

There was no platform provided for seamen to alight from the pilot ladder at the main deck level. The pilot ladder was not rigged next to the horizontal platform which folds out from the side of the ship from the main deck of the vessel.

Farley went on shore liberty at approximately 6 p.m. on April 5, 1952, in a liberty launch chartered by the representative of the vessel owner. While ashore Farley saw other members of the crew, including assistant cook, Malcolm Edward Potts, sitting at a table with beverages in front of them (Tr. 260). Farley returned to the liberty launch which left the dock shortly after midnight on April 6, 1952 (Tr. 114). Approximately twelve to fifteen crewmen from the "SS AUGUSTIN DALY" were returning to the vessel in the liberty launch, including

Farley and assistant cook, Malcolm Edward Potts (Tr. 114, 245). The voyage back to the vessel was uneventful and there was no boisterous or drunken activity (Tr. 117, 641, 642). The liberty launch pulled alongside the "SS AUGUSTIN DALY" at the point where the pilot ladder hung down.

The returning crewmen got up from their seats and started forward to the bow of the launch where the pilot ladder was situated. There was no crewman on duty on the deck of the vessel supervising the return of the liberty party up the pilot ladder.

One of the returning crewmen climbed the pilot ladder. The second crewman up the ladder was assistant cook, Malcolm Edward Potts (Tr. 415), who was on his first voyage. Potts had never previously ascended a pilot ladder and had received no instructions from the master or other crewmen of the "SS AUGUSTIN DALY" as to the proper manner of ascent (Tr. 421). Potts ascended the pilot ladder with one bottle under his left arm and another bottle in his right hand (Tr. 417). While Potts was attempting to get off the ladder at the main deck level, he fell over backwards, a distance of approximately 19 feet, and landed on three men who were standing on the deck of the liberty launch waiting to board (Tr. 122). There was no warning sounded prior to Potts' fall (Tr. 120). Farley was standing approximately five feet from the ladder when struck, and one of the other crewmen who was struck was standing closer to the ladder (Tr. 257). Potts, who was uninjured by the fall, then retrieved one of the two bottles which he was carrying, and proceeded up the Jacob's ladder (Tr. 419).

Farley was talking to a fellow crewman when struck, and did not observe Potts' manner of ascending the ladder. Farley, in thirty years at sea, had never seen a pilot ladder used for shore liberty (Tr. 392-393) and had never seen a seaman fall from a ladder (Tr. 254).

SUMMARY OF ARGUMENT

(1) Potts' negligence was proximate cause of accident.

(2) Potts was acting within scope of employment.

(3) Ship was negligent in not providing safe method of ingress.

(4) Farley was not negligent.

(5) Ship was unseaworthy.

(6) Findings of trial court, supported by substantial evidence, should not be disturbed .

(1) Potts' Negligence Was Proximate Cause of Accident.

The trial court found that the proximate cause of Farley's injuries was the negligence of respondent's agent, Potts, in ascending the pilot ladder with hands encumbered (Tr. 39). The testimony was unanimous that it is extremely hazardous to climb a pilot ladder in the manner selected by the inexperienced crewman, Potts, and respondent has not contended to the contrary. In view of the overwhelming evidence on this specification of negligence, it became unnecessary for the trial court to decide whether respondent was negligent, or the vessel unseaworthy in the other particulars alleged.

Potts fell while attempting to climb over the main deck rail (Tr. 418, 440). He was unable to state any particular cause of this fall except to say that the encumbrance of the bottles may have made his movements "a little awkward" (Tr. 417). The findings of the trial court as to the proximate cause of Pott's fall were thus amply supported by the evidence.

(2) Potts Was Acting Within Scope of Employment.

Although this issue is included in respondent's statement of Points on Appeal (Tr. 653), it has not been argued in the lower court or in respondent's brief. This is perhaps because the issue has been clearly settled adversely to respondent by such cases as: *O'Donnell v. Great Lakes Dredge and Dock Co.*, 318 U.S. 36, 87 L. Ed. 596; *Marceau v. Great Lakes Transit Corp.*, 146 F.2d 416 (2 Cir. 1945); *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 87 L. Ed. 1107; *Warren v. U. S. A.*, 340 U.S. 523, 95 L. Ed. 503; *McDonough v. Buckeye Steamship Co.*, 103 F. Supp. 473, Affd. 203 F.2d, 558 (6 Cir., 1951); Cert. Den., 97 L. Ed. 1357; *Kyriakos v. Goulandris Bros. S. S. Co.*, 151 F.2d 132 (2 Cir., 1945); *Adams v. American President Lines*, 146 P.2d 1, 1944 A.M.C. 550; *Wong Bar v. Suburban Petroleum Transport Co.*, 119 F.2d 745 (2 Cir., 1941).

The last above cited case of *Wong Bar v. Suburban Petroleum Transport Co.*, involves a close factual parallel with the instant case. The alleged negligence of the fellow crewman occurred when he and the injured libel-

lant were both off duty and were leaving the vessel. The Court held that both crewmen were acting "in the course of their employment" while leaving the vessel, and thus the deckhand's negligence in assisting the cook in leaving the tugboat was imputable to its owner.

In the instant case, both Potts and Farley were returning to the vessel from authorized shore leave. As was stated by the U. S. Supreme Court in the case of *Aguilar v. Standard Oil Co.,* supra:

> "In short, shore leave is an elementary necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion."

That an act is in violation of ship's regulations does not render it beyond the scope of employment. If the rule were otherwise, an employer might evade liability for his servant's torts by instructing them to refrain from negligent conduct. As is stated in the case of *Adams v. American President Lines,* supra:

> "It is contended that the act of throwing the (orange) peel on the deck was contrary to regulations and in disobedience of orders. If that was so, the fact does not change the character of the act as one within the scope of the employment. The rule is that an employer is liable for the acts of his employees within the scope of the employment notwithstanding they are done in violation of rules, orders or instructions. (Ruppe v. City of Los Angeles, 186 Cal. 400, 199 P. 496; Johnson v. Monson, 183 Cal. 149, 190 P. 635; 35 Am. Jur. p. 993, Sec. 559.)"

The negligence of Malcolm Edward Potts while returning to his employment aboard respondent's vessel is thus clearly imputable to the ship owner.

(3) Ship Negligent in Not Providing Safe Ingress.

On page 24 of its brief respondent cites four cases for the proposition that a vessel is not negligent in furnishing a pilot ladder in good condition. All of the cases are distinguishable in that they involve sole negligence of the plaintiff in falling from a ladder.

Libellant does not contend that a pilot ladder is an unsafe appliance under all circumstances. When only a few members of the ship's crew are using the ladder during duty hours (e.g., when going ashore for ship's business), or when a limited number of outside personnel must board the ship (e.g., pilots, immigration, health and other inspectors), the device is perhaps not unreasonably unsafe. Likewise, when the vessel's deck crew is required to do painting on the ship's side, the use of a pilot ladder to lower these men to stagings may be the only method whereby the stagings on said portions of the vessel could be reached.

However, all of the above circumstances have three things in common (Tr. 141, 142):

(1) The ladder is being used during duty hours for specific ship's business.

(2) The ladder is being used only by certain members of the ship's crew and other persons who, by their special duties, have become experienced in its use.

(3) It would be inefficient and perhaps impracticable to rig an accommodation ladder for each isolated boarding required by the above.

None of these considerations apply to a ship which is at anchor in smooth water for five days during which

time shore leave is to be given the entire crew. Use of the pilot ladder for shore liberty involves the following additional hazards:

(1) Various members of the crew (e.g. steward's department) are not experienced in the use of pilot ladders.

(2) Various members of the crew return to the vessel from shore liberty in an exuberant state (Tr. 608).

(3) Various crew members return to the ship carrying foreign purchases.

The hazards are further increased when we consider that the pilot ladder in question was rigged to the boat deck of the vessel without any safe means to alight at the main deck level, and without any gangway or deck watch to supervise the return of the liberty party.

There was also evidence that considerable exertion is required to climb twenty feet up a pilot ladder (Tr. 147-149). The entire cause of the accident could have been avoided by rigging the ship's accommodation ladder which is designed and intended for use by a vessel at anchor. The boarding of the vessel would then have been a safe and simple operation rather than a test of strength and agility.

Respondent thus failed in its non-delegable duty to provide libellant with a safe place in which to work. The overwhelming trend of maritime decisions is toward the establishment of a higher standard of care on the part of ship owners than is required of employers on shore. *Armit v. Loveland,* 115 F.2d 308; *Taber v. Cities Service Oil Co.,* 1950 A.M.C. 1405; *Cleveland-*

Cliffs Iron Co. v. Martini, 96 F.2d 632; *Storgard v. France & Canada S. S. Corp.,* 263 F. 545.

Libellant obviously concedes that proof of negligence is a prerequisite to recovery under the Jones Act. However, in support of that proposition, respondent cites six cases in its brief (p. 24), five of which involve no negligence on the part of the defendant, and sole negligence on the part of the plaintiff. The sole exception is *Johnson v. U. S. A.,* 333 U.S. 46, where libellant recovered for injuries caused by the negligence of a fellow crewman. Because the negligence of respondent, under the doctrine of respondeat superior is unquestioned in the instant case, these cases cited by respondent have no application herein.

(4) **Farley Was Not Negligent.**

Respondent seeks to bar recovery by asserting two theories of negligence on the part of Farley; sole negligence of Farley in being in a dangerous place, and breach of duty.

By the first theory, Farley is asked to anticipate the consequences of the following negligence on respondent's part:

(a) In providing an unsafe appliance for ingress of the shore liberty party.

(b) In rigging such appliance in a hazardous manner.

(c) In failing to supervise its use.

(d) In employing a wholly untrained crewman to use the appliance.

(e) The negligence of the fellow crewman in using the appliance in a hazardous manner.

Negligence is never presumed, and the mere showing that three men were struck by Potts' falling body is no proof that they were standing in an area where danger was to be reasonably apprehended. The anticipation of the negligent acts of another is a difficult task when the consequences of such negligence are commonly known. No reported cases can be found which deal with the type of accident here involved. Under these circumstances it would be extremely harsh, unfair and unrealistic to impose upon libellant the onus of apprehending such a freak accident. In the similarly freakish accident involved in the case of *Cleveland-Cliffs Iron Co. v. Metzner,* 150 F.2d 206, cited by respondent, the trespassing plaintiff was allowed to recover.

The case of *Larsson v. Coastwise Line,* 181 F.2d 6, cited by respondent, is clearly distinguishable. The danger whereby Larsson was injured was obvious and inherent in the operation of any machinery. Larsson placed his hand inside machinery which was ready to be turned on at any time. Such recklessness is comparable to working on live electrical wires. The Larsson case is factually parallel to the case of *Portel v. United States,* 85 F. Supp. 488. In that case, libellant failed to ascertain whether the ship's steam lines were shut off prior to working on them. When libellant opened a live steam line, he was injured. The Court mitigated libellant's damages by only 25 per cent because of his contributory negligence. Unlike the instant case, both the Larsson

and Portel cases involve active negligence by the libellant in reckless disregard of commonly apprehended danger.

The cases of *Ford v. United Fruit Co.*, 171 F.2d 641; *Seville v. U. S. A.*, 163 F.2d 296; *Atlantic Coast R. R. Co. v. Anderson*, 221 F.2d 548; *U. S. Gypsum Co. v. Balfanz*, 193 F.2d 1, and *Witt v. U. S. A.*, 82 F. Supp. 696, cited by respondent all involve sole negligence of the plaintiff and a total absence of negligence on the part of the defendant. The established proof of respondent's negligence herein renders these cases inapplicable.

The remaining cases cited by respondent in support of this theory are distinguishable in that they involve plaintiff's disregard of a specific company regulation, disobedience of orders, or disregard of commonly apprehended danger.

At the time of his injury, libellant was on authorized leave from duty for purposes of diversion and relaxation, which he had a right to enjoy. From his limited observation of Potts ashore, and on the returning launch, Farley had no reason to believe that the assistant cook would later act negligently. According to respondent's own witness, Potts was in fact sober (Tr. 626), and Farley did not know of Potts' complete inexperience in ascending pilot ladders. When the liberty launch arrived alongside the vessel, the liberty party got up from their seats and moved forward toward the bow of the launch preparatory to climbing the ladder. This was certainly the natural thing to do. Apparently the only persons in the liberty launch who knew that Potts' hands were

encumbered were Potts himself, and his companion, S. L. Johnson. Johnson, who thought Potts was carrying some souvenirs, did not even watch Potts' ascent and did not know when Potts fell from the ladder (Tr. 629).

Potts testified that although his hands were encumbered, he kept both hands on the ladder (Tr. 417, 418). Thus, the encumbrances would not have been visible to Farley because the ascending man's body was between Farley and the ladder. The lighting conditions on the launch were dark or hazy (Tr. 399). Farley was standing in the midst of other crewmen, and the available space on the launch was small. If Farley had seen Potts fall, it is extremely doubtful that he could have avoided injury. There was no place to run to.

Respondent's breach of duty theory is wholly lacking in evidentiary support. There was no testimony that a second assistant engineer on shore leave has any duty or authority to supervise, control or conduct a boarding operation for seamen returning to the vessel. On the contrary, the evidence was that such was the duty of the deck officer on watch or his designate (Tr. 159, 160, 468).

Libellant's evidence showed that a second assistant engineer exercises a command function as a ship's officer only as to his subordinates in the engine department of the vessel during his hours of duty in that department (Tr. 152, 153, 469). He is otherwise a technical or mechanical specialist (as a radio or radar operator would be), having no power to issue order to men outside his department. It is noteworthy that respondent

does not point out any evidence whereby the alleged duty is stated.

The statute (18 U.S.C.A., Sec. 2196), cited by respondent, creates no duties whatever. It merely prescribes punishment for wilful neglect of duty by any merchant vessel employee, regardless of rank.

Under the evidence herein, Farley had no duty to warn Potts until he became aware of Potts' negligence, and perhaps not even then. Respondent strenuously contends that the employer had no duty to warn the inexperienced seaman, Potts, of the danger of climbing a pilot ladder with encumbered hands. This, so respondent contends, is because there is no duty to warn against obvious dangers.

Yet, respondent contends that a second assistant engineer, who had no authority to control Potts' actions, and who was not aware of his inexperience, had such a duty to warn of obvious dangers. Respondent overlooks the inconsistencies of its arguments in its zeal to fabricate a duty whereby recovery may be barred.

The case of *Jensen v. U. S.*, 184 F.2d 72, cited by respondent, is distinguishable in two respects:

(1) The ship's officers had actual knowledge of a situation dangerous to the safety of the crew.

(2) Despite that knowledge, the officers conducted a fight between drunken crewmen on the deck of the vessel.

The case of *Walker v. Lykes Bros. S. S. Co.*, 193 F.2d 772, cited by respondent, is one involving unsea-

worthiness, not negligence. In our view, the court's attempt in the Walker case, to distinguish between types of contributory negligence, is unsound and had the effect of resurrecting the defense of assumption of risk. This is clearly pointed out in the case of *Boat Dagney v. Todd,* 224 F.2d 203 (1 Cir. 1955), wherein the decision in the Walker case is carefully analyzed and determined to be unsound. Speaking of the Walker case, the First Circuit Court of Appeals observed:

> "We cannot find in the Act any suggestion that Congress had in mind this refinement between the two species of contributory fault. It is significant that Judge Hand felt himself to be bound by cases which were decided before the 1939 amendment to the Federal Employers' Liability Act, which plugged up what Congress deemed to be a leak in the original Act by abolishing specifically the defense of assumption of risk."

The Walker case has not been followed outside the Second Circuit. The case of *Mason v. Lynch Bros. Co.,* 131 F. Supp. 255, cited by respondent, follows the disguised assumption of risk doctrine set forth in the Walker case. However, the court clearly indicated that the doctrine is applicable only to masters of vessels. Therein it is stated:

> "If this controversy involved a seaman not serving as master of the vessel at the time, this court would permit a recovery."

The case of *Mormino v. Leon Hess, Inc.,* 119 F. Supp. 314, was decided by a district court of the Second Circuit, subsequent to the Walker case. The case further narrows and qualifies the Walker decision and was affirmed by the Second Circuit Court of Appeals

in 210 F.2d 831. In that case, libellant was an engineer who was ordered to fix a leaky oil connection. Libellant waited six days before attempting the repair, at which time a large pool of oil had collected. The court found libellant negligent in stepping into the pool of oil whereby he fell. The court refused to apply the Walker case doctrine and stated:

> "Nor is libellant barred from maintaining this action because he sustained his injury in the performance of an act designed to remove the condition which caused his injury. In relying on such a proposition, respondent impliedly invokes the doctrine of assumption of the risk, Becker v. Waterman S. S. Corp., 2 Cir., 179 F.2d 713, a defense which is not available in a suit brought under the Jones Act. Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 59 S. Ct. 262, 83 L. Ed. 265."

The cases of *Battice v. U. S.*, 79 F. Supp. 932, and *Mullen v. Fitzimmons & Connell Dredge & Dock Co.*, 191 F.2d 82, cited by respondent, are both cases involving no negligence or unseaworthiness on the part of the ship. Although libellant was negligent in both cases, the cases are only authority for the proposition that proof of negligence or unseaworthiness is a prerequisite to recovery under the Jones Act. Respondent's ingeniously created breach of duty theory therefore collapses for lack of evidentiary or judicial support.

If there was any negligence on libellant's part, such was so minuscule as to permit a recovery even if the doctrine of contributory negligence were available as an absolute defense to this suit.

(5) Ship Was Unseaworthy.

The ship owner's warranty of seaworthiness presents a species of liability without fault, as to latent or patent defects in the ship's hull, gear or crew. The ship owner's liability is that of an insurer, if the warranty of seaworthiness is breached. The warranty is that the hull, gear and crew shall be reasonably fit to meet the usual contingencies of a voyage. *Socony-Vacuum Oil Co., Inc., v. Smith,* 305 U.S. 424, 83 L. Ed. 265; *Sea's Shipping Co. v. Sieracki,* 328 U.S. 85, 90 L. Ed. 1099; *Keene v. Overseas Tank Ship Corp,* 194 F.2d 515 (2 Cir. 1954, Cert. Den., 343 U.S. 966, 96 L. Ed. 1363; *Boudoin v. Lykes Bros. S. S. Co.,* 348 U.S. 336, 99 L Ed. 296.

Libellant contends that a ship cannot be seaworthy unless a reasonably safe appliance for the crew's ingress and egress is rigged while the ship is at anchor. The case of *Sea's Shipping Co. v. Sieracki,* supra, holds that the warranty of seaworthiness "applies as well when the ship is moored at a dock as well as when it is at sea."

In the instant case, respondent's vessel was unseaworthy because it was not fitted out with an appliance for ingress and egress which was adequate for the purpose for which it was intended. The adequacy of the pilot ladder as a seaworthy device must be tested by the conditions prevailing at the time of its use, and the purpose for which it is intended. The undisputed evidence is that the pilot ladder was rigged to the boat deck rail of the vessel, to provide ingress and egress at the main deck level, without any platform, for the ship's crew on shore liberty, without a deck or gangway watch

being provided to supervise its use. It seems clear that the appliance was inadequate for such a purpose. In any case, the use of the appliance under these circumstances constitutes negligence.

A vessel is unseaworthy if the master or the crew fail to use safe appliances furnished by the ship owner. *Mahnich v. Southern S. S. Co.,* 321 U.S. 96, 88 L. Ed. 561.

Libellant further contends that the vessel was unseaworthy in that a member of its crew, Malcolm Edward Potts, was an incompetent seaman, and was not equal in seamanship to ordinary men in the calling.

It is now clear that the warranty of seaworthiness runs not only to the ship's hull and gear, but also to its crew. The warranty of seaworthiness of the crew was clearly defined in the case of *Keene v. Overseas Tank Ship Corp.,* supra, as follows:

> "Applied to seamen, such a warranty is, not that the seaman is competent to meet all contingencies; but that he is equal in disposition and *seamanship* to the ordinary man in the calling." (Emphasis supplied.)

The the same effect is the case of *Boudoin v. Lykes Bros. S. S. Co.,* 348 U.S. 336, 99 L. Ed. 296. Therein the decision of the Fifth Circuit Court of Appeals was reversed, and a recovery allowed.

We observe that both of the last above cited cases involve a situation where the ship's servant is obviously acting outside the scope of his employment in assaulting a fellow employee, and the master had not know-

ingly hired an incompetent servant. There is considerably more equity in requiring the ship owner to respond in damages where the accident is caused by a lack of elementary seamanship by an inexperienced crewman who is acting within the scope of his employment. As was mentioned in the *Keene v. Overseas Tank Ship Corp.* case, after the owner had used due care in selecting the crew, there may be cases where certain crewmen will turn out to be not equal in disposition to the ordinary man of the calling. However, the existence of a savage or vicious disposition is a difficult trait to ferret out, in normal circumstances. By contrast, basic lack of seamanship is easily ascertainable and to a large degree, remediable.

In the instant case, Potts had never been to sea previously, and had never ascended a pilot ladder. The evidence is uncontradicted that the master of the vessel gave no instructions to crewmen concerning the proper method of ascending a pilot ladder (Tr. 598, 599), although it was his duty to do so.

It is the non-delegable duty of a ship owner to man his vessel with competent officers and men. The cases of *In Re: Pacific Mail S. S. Co.,* 130 Fed. 76, and *The Drill Boat No. 4,* 233 Fed. 589, fix liability on the ship owner based on unseaworthiness by reason of the incompetency of the crew.

We conclude that assistant cook Potts has been clearly shown not to have been equal in seamanship to the ordinary man in the calling, both by his complete inexperience at sea and by his abortive attempt to climb the pilot ladder in the manner previously described.

(6) Findings of Trial Court, Supported by Substantial Evidence, Should Not Be Disturbed.

The brief of respondent and its statement of Points on Appeal represent primarily an attack on the trial judge's findings of fact on the issue of contributory negligence. It is well settled that the findings of the trial judge will not be disturbed on appeal if supported by substantial evidence, and not clearly erroneous. *City of Portland v. Luckenbach S. S. Co., Inc. (The Marine Leopard),* 217 F.2d 894 (9 Cir. 1954); *The President Madison,* 91 F.2d 835; *States S. S. Co. v. U. S. A., et al (The Pennsylvania),* Docket No. 15131, decided May 31, 1957, 9th C.C.A.

As was stated by this court in the case of *Mattson Navigation Co. v. Hansen,* 132 F.2d 487 (9 Cir., 1942):

> "The sufficiency of the findings is to be considered here with reference to the provision of Rule 52 of the Federal Rules of Civil Procedure, 28 U.S.C.A., following Sec. 723 (c): 'Findings . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.'"

In this case, three ship's captains testified in Court as expert witnesses concerning the various contentions of the parties. Libellant himself, and Leo Zaleski, 3rd assistant engineer aboard the "S. S. AUGUSTIN DALY" also testified concerning the facts of the accident. The trial court had the opportunity of observing the demeanour of these witnesses, and was in an excellent position to judge the credibility of their testimony. Respondent now asks this court to re-weigh and re-evaluate the testimony based upon the cold record.

The record contains ample evidence to support the findings of the trial court. The findings and decree were not signed until approximately eight months after the trial of the case. In the interim, the record shows that the contentions of the parties were argued and re-argued, both orally and on briefs.

Although an appeal in admiralty is denominated a trial re novo, this court has limited the scope of re-examination of the trial court's findings of fact to matters clearly erroneous or not supported by substantial evidence. Such is not the case herein.

BRIEF REPLY ON DAMAGES

Respondent makes no true answer to libellant's appeal on the issue of damages. Respondent indulges in pure speculation on such subjects as the amount of work available for seamen, and the availability of social security benefits for a man who has had no social security earnings for the past five years. We feel justified in asking this court to take judicial notice of the fact that there has been an overall wage increase of approximately twelve per cent in the shipping industry in the past two years. This court recognized the existence of the ever-ascending spiral of wages and prices in the case of *U. S. A. v. Luehr,* 208 F.2d 138.

It also appears that respondent takes issue with the uncontradicted medical testimony relating to the nature and extent of libellant's injuries and disability. Respondent does not repeat its previous estimate of Farley's

wage loss to the date of trial, and future wage loss (Tr. 29). We do not understand how respondent can now in good conscience contend that the trial court's award of damages was even remotely compensatory. Respondent offers no evidence or computations to support the inadequate award, but merely contends that it should not be disturbed.

No clearer illustration could be found of a finding of fact (damages) which is unsupported by any substantial evidence. Further, Finding of Fact No. 10 (Tr. 40) is wholly inconsistent with Findings of Fact Nos. 7, 8, and 9, which are supported by substantial evidence.

It thus becomes the duty of this court to award compensatory damages based upon the trial court's findings of injury, disability, pain and suffering, and wage loss.

Respectfully submitted,

WILLIAMS & ALLEY,
DAVID R. WILLIAMS,
Proctors for Appellant, John Farley.